IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1250

INTERNATIONAL TRACERS OF AMERICA,

Appellant,

v.

ESTATE OF ERIC HARD; MINNIE JOHNSON, Individually and as Administratrix of the Estate of Eric Hard; SVEA HEEHN, ESTHER BENSON; AND HILDA SHIELDS, Each Individually,

Appellee.

On Appeal From the Supreme Court of Washington.

JURISDICTIONAL STATEMENT

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I N D E X

TABLE OF AUTHORITIES

IN THE

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Appellee.

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THE OPINIONS BELOW

The Memorandum Opinion of the Supreme Court of Washington is reported in 89 Wn 2d 140,

October 13, 1977, and appears herein as Appendix A. No other written opinion has been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a civil matter initiated by the Appellant, International Tracers of America, having filed suit against the above named Defendants/Appellees for breach of contract and money damages arising therefrom. Appellees answered, and prevailed against Appellant, in part on the basis of the Washington State Statute RCW 63.28.330. Said Statute imposes a 5% limit on compensation paid to locate property when such property is known to be subject to State disposition as unclaimed property. Appellant contends that RCW 63.28.330 is invalid because it is repugnant to the Fourteenth Amendment to the Constitution of the United States. The decision of the Supreme Court of Washington was in favor of the validity

of RCW 63.28.330.

(ii) The judgment and opinion sought to be reviewed is the ruling of the Supreme Court of Washington denying Appellant's appeal to that Court and thereby upholding the judgment of the lower Court of the State of Washington finding in favor of Appellee. That ruling was entered on October 13, 1977. No Petition for rehearing was filed. Notice of Appeal was filed in the Superior Court of the State of Washington in and for Thurston County and the Washington State Supreme Court, the Courts possessed of record, on January 9, 1978.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257 (2).

(iv) Cases sustaining the jurisdiction of this Court are:

Huffman v. Pursue Limited, Ohio (1975), 95 S CT 1200;

U.S. Ex Rel. Wojtykha v. Hopkins, 517 F. 2d 420 (1975);

Gorman v. Washington University, 62 S CT 962 (1942);

Metlakatla Indian Community, Annette Island Reservation v. Egan Alaska (1960), 80 S CT 1321.

(v.) The validity of Washington State Statute RCW 63.28.330 is here involved. The full text of that code is as follows:

63.28.330 LIMITATION ON FEE FOR LOCATING REPORTED OR DELIVERED PROPERTY - PENALTY

It shall be unlawful for any person to seek or receive from any person or contract with any person for any fee or compensation for locating or purporting to locate any property which he knows has been reported or paid or delivered to the tax commission pursuant to this chapter, in excess of 5% of the value thereof returned to such owner. Any person violating this Section shall be guilty of a misdemeanor and shall be fined not less than the amount of the fee or charge he has sought or received or contracted for, and not more than than ten times such amount, or imprisoned for not more than thirty days, or both.

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

Does Washington State Statute RCW 63.28.330 that declares the contracting for compensation in excess of 5% ofthe value of property recovered for the service of locating property which he knows has been reported or paid or delivered to the tax commission of the State of Washington to be a misdemeanor and subjects the offending party to fine and/or punishment for entering into such a contract and thereby denies that person of the right to freely negotiate and enter into contracts for the providing of this service at a rate mutually agreeable to both parties, violate the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

Eric Hard died intestate on June 21, 1964 in the State of Alaska. As far as anyone knew at the time of his death, Mr. Hard died without heirs. The State of Washington, Department of Revenue, under RCW 63.28 came

into possession of certain common stock owned by Eric Hard on the date of his death and located within the State of Washington, and commenced proceedings under RCW 63.28 to escheat said stock to the State of Washington for want of claimant heirs. The Appellant is a Florida corporation which is in the business of locating abandoned property and locating the legal heirs to said property. In this particular case, the Appellant discovered the existence of the above referenced common stock within the State of Washington. A written contract under which Appellant was to locate property to which the defendants would be able to establish a legal claim was entered into between Appellant and Defendant. At the time of contracting, no Defendant was a resident of the State of Washington and the contract itself was negotiated and executed outside of the State of Washington on or about the 26th day of July, 1972.

Under this contract the Appellant was to receive 40% of any amounts recovered by Defendants due to Appellant's efforts and Defendants were to share the remaining 60%. Through the efforts of the Appellant, the Defendants were in fact able to recover and have, in fact, received a substantial sum from the State of Washington Revenue Division. This recovery was made through the Appellant's informing Defendants of the specific location of the funds at issue and the method by which those funds could be recovered. Subsequently the Defendants initiated probate proceedings in the State of Washington and were awarded the value of the escheated stock. During the probate proceedings Defendants informed Appellant that they were refusing to honor the negotiated contract and would refuse to pay to Appellant the contract fee. Defendants based their refusal on Washington State Statute

RCW 63.28.330. Appellant then brought an action In the Superior Court of the State of Washington in and for Thurston County seeking to recover under the terms of the parties' contract. The Defendants prevailed in the trial court and Appellant appealed to the Washington State Court of Appeals. The Washington State Supreme Court elected to hear this matter directly and argument was made before the State Supreme Court.

At the time of the filing of the Notice of Appeal to the United States Supreme Court, this matter has been brought to final judgment in both the Superior Court of the State of Washington in and for Thurston County and the Supreme Court of Washington. Both Courts have of record filed their final judgments.

The federal question of the constitutionality of RCW 63.28.330 was raised by assignment of error in Appellant's Brief to the Supreme

Court of Washington. The Supreme Court of Washington in its opinion 89 Wn 2d 140 declared RCW 63.28.330 to be constitutional. At page 148 it stated,

> The final and principal question is whether RCW 63.28.330, the text of which is set out in footnote 1, deprives Tracer of property without due process of law. The question is also raised on appeal for the first time. No evidence was introduced below on the question of constitutionality. Tracers, to succeed, must do so on the face of the statute without the benefit of any evidentially showing. It contends the statute is arbitrary and capricious on its face and that there is no rational relationship between the statute and any lawful state purpose.
> A statute is presumed constitutional until the challenging party proves unconstitutionality beyond reasonable doubt...cite...For all we know from the face of the statute, the Legislature might well have believed the practice prohibited was the evil of extortionate charges. The statute was carefully confined to apply only to cases of fees for locating or purporting to locate property which he knows has been reported or paid or delivered to the Department of Revenue pursuant to this Chapter. RCW 63.28.330. There is no showing the evil of extortionate charges did not exist. Such an evil may reasonably be conceived to have existed.

At this time the Washington State Department of Revenue and the Washington State Courts have released the funds herein at issue. Partial distribution of those funds has already been made and further distribution is still pending. The Order of the Washington State Court is that the Appellant's recovery shall be limited to the statutory 5% and any amounts over that due and owing under the contract are forfeited.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The sole basis for the Washington Court's reducing the percentage of compensation to be received by the Appellant, from the contracted percentage to 5%, was Washington State RCW 63.28.330. In the absence of this statute Appellants and Defendants would have been free to negotiate a mutually acceptable contract and both would have been bound by that contract. The Washington Supreme Court's upholding the validity of this statute in

the face of an attack on the statute based upon it being repugnant to the Fourteenth Amendment of the Constitution of the United States places this question squarely before the United States Supreme Court.

(i) State Government's May Not Use Their Police Power In An Arbitrary And Capricious Manner

It has long been held under the Constitution of the United States that no person shall be deprived of life, liberty or property without due process of law. This concept is embodied in the Fourteenth Amendedment to the Constitution of the United States. In the Courts struggle to provide tangible standards and test for the implementation of this abstract concept, various doctrines have risen, been modified, overruled, and replaced.

Fortunately in the area of Economic Substitutive Due Process the Supreme Court

of the United States has set forth a sensible guideline for evaluating the constitutionality of state statutes attacked as being repugnant to the Fourteenth Aemndment. The test for constitutionality is clearly set forth in Nebbia v. New York,(1934) 291 U S 502, 54 S CT 505, 78 L ed 940. The test prescribed is that a statute is unconstitutional unless there exists a "Rational Relationship" between the "Means" it proposes to use and the desired "Ends" sought to be achieved by the statute. Any statute failing to be supported by a demonstrable rational relationship between the means and ends of the statute must be held invalid.

(ii) The Supreme Court of the United States Should Not Show Deference To Cases Seeking To Enforce The Economic Substitutive Due Process Test As Set Forth In Nebbia

The Appellant is not proposing a return to the extremist view of the Lochner Economic Substitutive Due Process Doctrine of the

early 1900's. Lochner v. New York,(1905) 198 U S 45, 25 S CT 539, 49 L ed 937. The Appellant would concede that the absolute non-governmental interference of the Lochner Doctrine is as much in error as an absolute hands off of philosophy by the Supreme Court to the evaluation of State Statutes attacked under the Nebbia test.

Since the Nebbia opinion in 1934, only a small handful of cases based on the issue of Economic Substitutive Due Process have been heard by the United States Supreme Court. It is unfortunate that the Court has created such a meaningful test as that set forth in Nebbia, and yet has permitted it to go virtually unused. Since the 1930's there has been an everincreasing flood of State regulatory statutes. The citizens only guard against an overzealous government infringing on its constitutional rights in the economic sphere is the Nebbia requirement

that such statutes must have a Rational Relationship between its Means and Ends. Each and every State Statute must be placed against this test for determination of its validity. For without this test, there will be no restraint upon State Government Police Power.

(iii) In The Area Of Social And Personal Rights, The United States Supreme Court Has Gone Far Beyond The Nebbia Rational Relationship Test In Striking Down State Statutes As Being Offensive To The Citizen's Right To Process Under The Fourteenth Amendment

In Griswald v. Conneticut (1964) 379 U S 926, 85 S CT 328, 13 L ed 2d 339, the opinion of Justices Harlen and White greatly expanded the scope of substitutive Due Process under the Fourteenth Amendment to the United States Constitution. This Court struck down as an unconstitutional violation of an Individual's Fundamental Rights, the Conneticut Statute controlling the sale of birth contraceptives. In doing so, this

Court went far beyond the mere "Rational Relationship" test of Nibbea and required a showing by the State of a "Significant State Interest" which outweighed the Individual's Fundamental Right. Without such a showing of a Significant Interest, the State was not allowed to infringe upon the Individual's Fundamental Rights.

Ten years later this Court again increased the State's burden to uphold a state statute which infringed upon Fundamental Personal Rights. In Roe v. Wade,(1973) 410 U S 959, 93 S CT 1409, 35 L ed 2d 694, this Court went so far as to demand that a State demonstrate a "Compelling Interest" before its statutes were allowed to infringe upon an Individual's Fundamental Personal Rights.

(iv) The United States Supreme Court Should Give The Same Treatment To Substitutive Due Process Cases Whether The Issue Be Social Or Economic.

As set forth above, the Supreme Court

of the United States has made heroic steps forward in its review of state regulatory statutes based upon the State's Police Power. Unfortunately, all of these expanding cases are in the area of social issues. For while the Court has continued to develop the scope of protection the Fourteenth Amendment Due Process provides to the nation's citizens in the areas of social issues, it has permitted virtually uncontrolled State Legislation in the area of Economic issues.

The cry for equal treatment to both Economic and Social issues has been most honorably stated by Justice Stewart in his opinion in Lynch v.Household Finance Corporation, (1972) 405 U S, 538, 92 S CT 1113, 31 L ed 2d 424, where he expressly rejected the distinction between personal liberties and property rights. His opinion is extremely valuable in setting the tone for proper evaluation of all due process cases. He states:

The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property rights without unlawful deprivation, no less than the right to speak or the right to travel is in truth a "personal" right. Whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental inter-dependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke of Civil Government 82 through 85 (1124); J. Adams, a Defense of the Constitution of Government of the United States of America, and F. Coker, Democracy, Liberty and Property, 112-132 (142); 1W. Blackstone, * 138-140. Congress recognized these rights in 1871 when it enacted the predecessor of Section 1983 and 1343 (3). We do no more than reaffirm the judgment of Congress today.

Let me be clear that Appellant does not seek an expansion of the Substitutive Due Process Doctrine. Rather he merely seeks a valid and fair implementation of the already existing Nibbea "Rational Relationship" test. The Appellant contends that if the Washington State Statute is exposed to the scrutiny

of the Nibbea "Rational Relationship" test that the State would not be able to demonstrate any lawful "Ends" arising from this statute. And that even if the State were able to demonstrate some lawful "Ends" that it would not be able to demonstrate that the "Means" of this Statute will rationally relate to those "Ends".

Therefore Appellant believes that his appeal presents a very substantial and significant federal question for review by the Supreme Court of the United States.

Respectfully Submitted,

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APPENDIX "A"

[No. 44624. En Banc. October 13, 1977]

INTERNATIONAL TRACERS OF AMERICA, Appellant,
v. ESTATE OF ERIC HARD, ET AL.
Respondents.

[1] Conflict of Laws-Failure To Plead Foreign Law or Show Actual Conflict-Effect. In the absence of a pleading of foreign law or a showing of an actual conflict between Washington law and the law of another state claimed to apply, a court need not take notice of another state's laws and such laws will be presumed to be the same as those of Washington.

[2] Conflict of Law-Contracts-What Law Governs-Significant Contacts. In applying the significant contacts test to determine the controlling law with respect to a contract dispute, great emphasis should be given to the place of performance.

[3] Executors and Administrators-Claims-Services to Estate-Nature-Required Showing. No recovery may be had against an estate for unsolicited services rendered on a voluntary basis unless it is shown that those services were absolutely and immediately necessary to preserve the estate and such need would have otherwise gone unsatisfied.

[4] Appeal and Error-Review-Issues Not Raised in Trial Court-In General. An appellate court will generally not consider any theory which is raised for the first time on appeal when it is one requiring a factual basis and on which the parties might have presented evidence had it been argued at trial.

[5] Statutes-Validity-Burden of Proof. A statute is presumed to be constitutional and a challenging party has the burden of establishing its unconstitutionality beyond a reasonable doubt. A statute will be upheld when a state of facts sufficient to justify its enactment can reasonably be conceived to have existed.

[6] Escheat-Abandoned Property-Finder's Fee-Statutory Limitation-Validity. RCW 63.28.330, which imposes a limit on compensation paid to locate property when such property is known to be subject to state disposition as unclaimed property under RCW 63.28, is not on its face unconstitutionally arbitrary and capricious or lacking in a rational relationship to a lawful state purpose.

Nature of Action: A company specializing in locating heirs of property which would otherwise escheat brought this action to recover its 40 percent fee under a contract with four out-of-state heirs to such property located in Washington. The action was brought against the four heirs individually and against one of the heirs in her capacity as administratrix of the estate.

Superior Court: The Superior Court for Thurston County, No. 48768, Robert J. Doran, J., entered a judgment on March 19, 1975, in favor of the plaintiff against the heirs only but limited recovery to the 5 percent maximum fee permitted by RCW 63.28.330.

Supreme Court: Finding no conflict of law issue involved and no basis for recovery against the estate, and holding the statute limiting such finder's fees to be constitutional on its face, the court affirms the judgment.

Buzzard & Glenn, P.S., by Frank E. Morris and Jerome L. Buzzard, for appellant.

Fred D. Gentry (of Bean, Gentry & Rathbone), for respondent Johnson.

Layman, Mullin & Etter and Frank J. Gebhardt, for respondents Heehn, et al.

HOROWITZ, J.-The principal issue here is the constitutionality of RCW 63.28.330, which places a 5 percent limit on fees a person can recover for locating property that he knows has already been reported or delivered to the Department of Revenue.[1]

Plaintiff-appellant International Tracers of America (Tracers) is a Florida corporation engaged in the business of locating heirs of decedents whose property would otherwise escheat to the state in which the property is located. On December 8, 1971, four heirs of Eric Hard (who died in Alaska) and Tracers entered into a contingent fee contract, signed in Minnesota, under which Tracers purportedly undertook to locate the assets of decedent Hard. The agreement drafted by Tracers, further provided that if "Tracers is able to succeed in securing control of assets of the Estate of Eric Hard, and, in the event a distribution of said assets is made to the undersigned heirs, then and in that event, we, the undersigned, agree to pay Tracers 40 percent of any amount which may be collected and distributed to the undersigned." None of the four heirs were or are residents of or domiciled in this state.

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1 RCW 63.28.330 provides in full as follows:
"It shall be unlawful for any person to seek or receive from any person or contract with any person for any fee or compensation for locating or purporting to locate any property which he knows has been reported or paid or delivered to the department of revenue pursuant to this chapter, in excess of five percent of the value thereof returned to such owner. Any person violating this section shall be guilty of a misdemeanor and shall be fined not less than the amount of the fee or charge he has sought or received or contracted for and not more than ten times such amount, or imprisoned for not more than thirty days, or both."

At the time the contract was entered into Tracers had known since 1970 that decedent died owning shares of stock worth approximately $23,000, the proceeds of which were being held by the State of Washington as a result of escheat proceedings in this state. The four heirs did not have this information.

In 1972 Minnie Johnson, one of the four signatory heirs, commenced probate proceedings in Thurston County, Washington, to administer and distribute decedent's assets to his heirs. She was appointed administratrix of the estate. Tracers filed no creditor's claim in the estate.

After the four heirs, including the administratrix, refused to pay Tracers its fees for its services, Tracers sued the four heirs and Minnie Johnson in her capacity as administratrix to recover its fees. Defendants answered raising certain affirmative defenses, including illegality of the contingency fee agreement, and counterclaimed for damages for harassment by Tracers in its efforts to collect the sums sued for. The trial court entered a judgment for Tracers against the four heirs (not the estate) but limited recovery to 5 percent of the ultimate distribution, and dismissed each defendant's counterclaim. Tracers appealed. Defendants did not cross appeal

Plaintiff contends: (1) Washington law, including RCW 63.28.330 does not govern this case; (2) Tracers is entitled to recover against the administratrix of the Eric Hard estate as well as the four heirs; and (3) even if the Washington law applies, RCW 63.28.330 is unconstitutional and therefore plaintiff's recovery is not limited to the 5 percent awarded. We do not agree with these contentions and affirm the appealed judgment.

We agree with defendants and the trial court that the validity of the contract here is to be determined by the Washington law. Plaintiff contends that under Baffin Land Corp. v. Monticello Motor Inn, Inc. 70 Wn.2d 893, 425 P.2d 623 (1967) the "significant contacts" test determines the validity of the contract. In Baffin we held that under the significant contacts test the court should consider all the significant points of contact, including the place of contracting, place of negotiations, and place of performance. Plaintiff contends it is impossible to determine what state had the most significant contacts with the

transaction and therefore Washington law does not govern, plaintiff not stating what other law it claims does govern. There are several reasons, however, which require use of Washington law.

[1] First, no actual conflict between the law of Washington and the law of any other state claimed applicable is shown to exist. Without such a conflict, courts will not engage in a conflict of law analysis. B. Currie, Selected Essays on Conflict of Law 176 (1963). There is no proof introduced as to the content of any foreign law claimed by Tracers to be applicable here. Nor did Tracers plead the law of any other state claimed to be applicable as required by RCW 5.24.040. Without such a pleading, the trial court was not required to take judicial notice of the law of any other state. RCW 5.24.010-070. In re Adoption of Candell, 54 Wn 2d 276, 340 P.2d 173 (1959); Save-Way Drug, Inc. v. Standard Inv. Co., 5 Wn. App. 726, 490 P.2d 1342 (1971). Without pleading or proof of applicability of foreign law, will be presumed to be the same as Washington's. In re Estate of Nelson, 85 Wn.2d 602, 606, 537 P. 2d 765 (1975); Granite Equip. Leasing Corp. v. Hutton, 84 Wn.2d 320, 324, 525 P.2d 223 (1974); Norm Advertising, Inc. v. Monroe St. Lumber Co. 25 Wn 2d 391, 171 P. 2d 177 (1946). See Byrne v. Cooper, 11 Wn App. 549, 523 P.2d 1216 (1974).

We note in passing that other states have banned the type of business in which Tracers is engaged on the ground that the business constitutes the unauthorizedpractice of law or is otherwise void as against public policy. Florida Bar v. Heller, 247 So.2d 434 (Fla. 1971); Skinner v. Morrow, 318 S.W.2d 419 (Ky.1958); In re Estate of Rice, 24 Ohio Op. 2d 379, 193 N.E.2d 566 (). Ct. 1963).

[2] Finally, we note the opinion in Baffin Land Corp. v. Monticello Motor Inn, Inc. supra at 900, in applying the significant contacts test, places great emphasis on the importance of place of performance. Cf. Restatement (Second) of Conflicts §202 (2)(1971).

Assuming arguendo it is necessary to resort to the significant contacts test under Baffin to determine whether Washington law governs, that test is met here. Under the contract, Tracers was required to attempt to secure control of the assets of Hard's estate.

At the time the contract was entered into, Tracers knew that Hard's assets were in the State of Washington and had been, or were in the process of being, escheated to the State of Washington. To secure the assets it was necessary to institute probate proceedings in Washington under Washington law to obtain control of those assets from Washington State Department of Revenue, and to determine who the heirs were and what their net distributive shares should be. Under these facts, the place of performance was the most significant contact thus rendering Washington law applicable.

Tracers next contends the administratrix of the estate in addition to the heirs, is liable on a quantum meruit basis for services allegedly rendered by Tracers to the estate to preserve its assets. Tracers claims either 40 percent of the distributive shares or an unspecified amount up to that figure. No contact was entered into by Tracers with the administratrix in her capactiy as such. Indeed the contingency fee agreement was executed before the commencement of probate proceedings in Thurston County, and Tracers does not claim an express contract with decedent. Tracers claims, however, that the discovery of estate assets in Washington was a service necessary for the preservation of the Eric Hard estate giving rise to a claim against the estate.

To support its claim on the merits against the administratrix of the Eric Hard estate, Tracers relies on Wilder Grain Co. v. Felker, 296 Mass. 177, 5 N.E.2d 207, 108 A.L.R. 385 (1936) and Tucker v. Wholey, 11 R.I. 543 (1877), which we find distinguishable on their facts. These cases involve claims against an estate for cattle feed needed to prevent the loss of the cattle furnished between the dates of the death of their owner and the appointment of the administrator for the owner's estate. Thus, in Wilder the seller, after decedent's death and before the appointment of an administrator of decedent's estate, furnished the decedent's cattle with feed needed to prevent their loss. The court recognized the administrator, in his capacity as such, could be held liable on quasi contractual principles

> only where the need is immediate, absolute and imperative in order to preserve the estate itself and where that need would otherwise remain unsatisfied. Nothing less will justify the intervention of a stranger thus to impose a charge upon the estate outside the regular course of administration.

> Merely that the service performed was desirable or in some degree beneficial to the estate is not enough.
>
> Wilder Grain Co. v. Felker, supra at 180.

The issue in Tucker was whether credit was extended the individual ordering the feed prior to his appointment as administrator, or extended to the estate by operation of the doctrine of the relation back.

In the instant case, netiher the services Tracers rendered to the estate as such nor its value are shown. If Tracers seeks recovery because it informed the administratrix of the existence of the assets in Washington prior to her appointment as administratrix, it was a service performed in fulfillment of its contingency fee agreement with the four heirs on whose sole credit Tracers relied.

Tracers appears to claim compensation from the estate in addition to compensation from the four heirs under the contingency fee agreement. Whether it makes such claim or claims compensation from the estate in lieu of compensation from the four heirs does not affect the result we reach. If the latter correctly states its position, the adminstratrix's duty is to defend against such claim, if the estate is not liable. If the former is her claim, then Tracers in effect seeks what amounts to a double recovery for services it rendered for the four heirs. In neither case is recovery permissible.

[3] The Wilder rationale does not apply so as to impose liability on the estate. This is not a case in which the need for the services, whatever they were, were shown to be "immediate, absolute and imperative" in order to preserve the estate and "where the need would otherwise remain unsatisfied." There was no danger of immediate loss of the estate assets requiring emergent activities prior to the commencement of probate proceedings. The administratrix already had the knowledge of the location of the assets when she instituted probate proceedings. She had lawfully acquired that knowledge from Tracers for a proposed fee in ample time to obtain those assets and was duty bound by her fiduciary obligation as administratrix to use that knowledge. The agreement placed no restriction upon that use. She did obtain those assets.

[4] Moreover, Tracers' theory of liability against the estate is untimely raised. It was not raised below when evidence might have been produced on the issue. It is raised for the first time on appeal. Under these circumstances, the court would not reverse on this issue. Matthias v. Lehn & Fink Prods. Corp. 70 Wn2d 541, 424 P. 2d 284 (1967).

Nor is Tracers entitled to recover a fee additional to that to which it is entitled under its agreement without violating its implied provisions. The heirs had a right to believe Tracers would perform its agreement in good faith; that good faith would preclude Tracers from directly or indirectly charging more than the compensation stipulated in the agreement; that a charge to the estate additional to the charge to the heirs would or could indirectly increase the amount of the fee Tracers had agreed upon in the agreement. If Tracers intended to charge an additional fee in any probate proceedings it could reasonably contemplate would occur subsequently in the course of performing the agreement, the agreement should have so provided.

[5,6] The final and principal question if whether RCW 63.28.330, the text of which is set out in footnote 1, deprives Tracers of property without due process of law. This question is also raised on appeal for the first time. No evidence was introduced below on the question of constitutionality. Tracers, to succeed, must do so on the face of the statute without the benefit of any evidentiary showing. It contends the statute is arbitrary and capricious on its face and that there is no rational relationship between the statute and any lawful state purpose.

A statute is presumed constitutional unless the challenging party proves unconstitutionality beyond a reasonable doubt. In re Harbert, 85 Wn.2d 719, 538 P.2d 1212 (1975); Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wn.2d 523, 520 P.2d 162 (1974). For all we know from the face of the statute, the legislature might well have believed the practice prohibited was the evil of extortionate charges. The statute was carefully confined to apply only in cases of fees for locating or purporting to locate property "which he knows has been reported or paid or delivered to the department of revenue pursuant to this

chapter". RCW 63.28.330. There is no showing the evil of extortionate charges did not exist. Such an evil may reasonbly be conceived to have existed. See Brewer v. Copeland, 86 Wn.2d 58, 542 P.2d 445 (1975).

Tracers concedes that the State may, in the proper exercise of its police power, fix maximum rates or prices for services rendered. Nebbia v. New York, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505, 89 A.L.R. 1469 (1934); Pestel, Inc. v. King County, 77 Wn.2d 144, 459 P.2d 937 (1969) (regulating maximum prices for services of an employment agency). See Sparkman & McLean Co. v. Govan Inv. Trust, 78 Wn.2d 584, 478 P.2d 232 (1970) (fixing a maximum rate of interest); Permian Basin Area Rate Cases, 390 U.S. 747, 20 L.Ed. 2d 312, 88 S.Ct. 1344 (1968).

Tracers also claims it cannot afford to remain in business on the basis of a 5 percent maximum service charge. This claim is not supported by any evidence. We cannot take judicial notice that the maximum service charge is too low to permit Tracers' business to survive. We, therefore, do not reach the question whether the claimed destruction of Tracers' business by application of the statute would render the statute unconstitutional.

Affirmed.

WRIGHT, C. J., and ROSELLINI, HAMILTON, STAFFORD, UTTER, BRACHTENBACH, DOLLIVER, and HICKS, JJ. concur.

APPENDIX "B"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

INTERNATIONAL TRACERS OF AMERICA,

Appellant,

v.

ESTATE OF ERIC HARD; MINNIE JOHNSON, Individually and as Administratrix of the Estate of Eric Hard; SVEA HEEHN, ESTHER BENSON; AND HILDA SHIELDS, Each Individually,

Appellee.

NOTICE OF APPEAL

Notice is hereby given that International Tracers of America, original plaintiff and appellant herein, hereby appeals to the

Supreme Court of the United States from that portion of the Judgment and opinion of the Supreme Court of Washington in this action in favor of the defendants/appellees entered on October 13, 1977 declaring Washington State Statute RCW 63.28.330 to be valid and constitutional.

This Appeal is taken pursuant to 28 USC §1257 (2).

Dated this 11th day of January, 1978.

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Olympia, Washington 98502

APPENDIX "C"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

INTERNATIONAL TRACERS OF AMERICA,

Plaintiff,

vs.

ESTATE OF ERIC HARD; MINNIE JOHNSON, individually and as Administratrix of the Estate of Eric Hard; SVEA HEEHN, ESTHER BENSON, and HILDA SHIELDS, each individually,

Defendants.

NO. 48768

JUDGMENT

This matter came on for trial on February 10, 1975, before the undersigned Judge, sitting without a jury, the Plaintiff being represented by JEROME L. BUZZARD, the Defendants MINNIE JOHNSON, individually and as Administratrix of the estate of Eric Hard, and HILDA SHIELDS, appeared by and through FRED D. GENTRY, of Bean, Gentry & Rathbone, and the Defendants SVEA HEEHN and ESTHER BENSON, appeared by and through FRANK J. GEBHARDT, of Layman, Mullen & Etter, and the Court having considered the evidence presented and being fully advised, and having entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff's action against the Estate of Eric Hard and MINNIE JOHNSON, as Administratrix of the Estate of Eric Hard be, and the same is hereby dismissed with prejudice. It is further

ORDERED, ADJUDGED AND DECREED that the counter-claim of the Defendants MINNIE JOHNSON, SVEA HEEHN, ESTHER BENSON and HILDA SHIELDS against Plaintiff, INTERNATIONAL TRACERS OF AMERICA, be and the same is hereby dismissed

with prejudice. It is further

ORDERED, ADJUDGED AND DECREED that Plaintiff shall have judgment against the Defendants, MINNIE JOHNSON, SVEA HEEHN, ESTHER BENSON, and HILDA SHIELDS, in an amount equal to five percent (5%) of monies finally distributed to said Defendants as heirs of of the Estate of Eric Hard in Thurston County Probate No. 16015 which is derivative of monies received from the State of Washington, Department of Revenue, It is further

ORDERED, ADJUDGED AND DECREED that neither party shall recover costs herein.

DONE IN OPEN COURT this 3rd day of March, 1975.

ROBERT J. DORAN, JUDGE

PRESENTED BY:

FRED D. GENTRY
of Bean Gentry & Rathbone
Attorneys for Estate of
Eric Hard, Minnie Johnson
and Hilda Shields

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1250

INTERNATIONAL TRACERS OF AMERICA,

Appellant,

v.

ESTATE OF ERIC HARD: MINNIE JOHNSON, Individually and as Administratrix of the Estate of Eric Hard; SVEA HEEHN, ESTHER BENSON: AND HILDA SHIELDS, Each Individually,

Appellee.

On Appeal From the Supreme Court of Washington

MOTION TO DISMISS OR AFFIRM

FRED D. GENTRY
Attorneys for Appellees
320 N. Columbia St.
Olympia, Washington
98507

I. OBJECT

The first object of this motion is to dismiss Appellant's appeal in this case as not being within the jurisdiction of the United States Supreme Court, for the following reasons: The appeal does not present a substantial federal question for review by this Court. The federal question sought to be reviewed was neither timely nor properly raised by the Appellant. The record of the proceedings in the Washington State trial court is devoid of any evidence regarding the federal question upon which Appellant seeks review, and in fact, said federal question was never presented to the trial court. Appellant requests a review by this Court on vague and general grounds and Appellant will be unable to provide to this Court an adequate record upon which to base a reversal of the decision of the Supreme Court of the State of Washington. This

case is not of sufficient significance or merit to warrant acceptance of jurisdiction by this Court in view of the time, effort and expense that will be required to process the appeal. Finally, the object of this motion is to obtain an Order of this Court that all costs of this appeal be assessed against the Appellant.

The second object of this motion, and as an alternative to the dismissal of this appeal, is to affirm the decision of the Supreme Court of the State of Washington, for the reasons stated above.

II. FACTS

Appellees' motions are based upon the following facts:

The entire record (Statement of Facts) of the proceedings held in the trial court consists of only thirty-one (31) pages. No witnesses testified at the trial. What evidence was presented was provided by incorporating into the record certain

interrogatories and responses to requests for admissions. The question of the validity of the statute involved, RCW 63.28.330, was not even mentioned by Appellant's counsel at the trial. See 89 Wn.2d 140, 148, 570 P.2d 131, 135 (1977).

This record, devoid of any claim that the state statute is unconstitutional, fails to provide a proper setting for review by the United States Supreme Court. The purported federal question was simply not developed at the trial level and the Supreme Court of the State of Washington had no evidence upon which to rule in Appellant's favor. So to, this Court will be faced with the same lack of evidence regarding the statute and its impact, and will be required to construe the statute on its face without the benefit of any evidentiary showing.

The statute in question is applicable to very limited factual situations. In

fact, the case sought to be appealed is the first reported decision in the State of Washington which even mentions RCW 63.28.330, in spite of the fact that the statute was enacted in 1955. Neither this case nor this statute is of sufficient significance to merit review by the highest court of our country.

III. CONCLUSION

Appellees respectfully request this Court to enter an order dismissing this appeal, or in the alternative, affirming the decision of the Supreme Court of the State of Washington, with all costs being assessed against Appellant.

Respectfully submitted:

FRED D. GENTRY
Attorney for Appellees
320 N. Columbia St.
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